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2011 FEB -8 AM 10:54

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SOUTHERN DISTRICT OF CALIFORNIA

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

PERFECT 10, INC.,

Plaintiff,

vs.

NETSAITS B.V., et al.,

Defendants.

CASE NO. 10cv1773 BEN (NLS)

**ORDER GRANTING DEFAULT
JUDGMENT AGAINST
DEFENDANTS**

[Dkt. Nos. 15-16.]

INTRODUCTION

Plaintiff Perfect 10, Inc. moves for default judgment against Defendants Netsaits B.V., Netsaits Holding B.V., Jennsights, Inc., and Gerco Marsch seeking \$780,000 in statutory damages, \$7,850 in costs and attorney's fees, and an injunction against further infringing conduct. Dkt. No. 16. Defendants have not appeared or filed any opposition to the motion. Plaintiff brought this action for copyright infringement and violation of California's Unfair Competition Law ("UCL") for Defendants' copy and display of Plaintiff's copyrighted images. Dkt. No. 5. For the reasons set forth below, the Court **GRANTS** Plaintiff's motion for default judgment, awards \$292,500 in statutory damages, \$7,850 in attorney's fees and costs, and issues a permanent injunction against further infringement by Defendants.

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BACKGROUND

Plaintiff designs and creates copyrighted images, including photographs, magazines, and video productions. First Am. Compl. (“FAC”) ¶ 9. Plaintiff owns and operates a website where consumers can pay a fee to access Plaintiff’s copyrighted material. FAC ¶ 12. Plaintiff’s revenues are primarily derived from sales of these membership fees. FAC ¶ 13. Plaintiff owns thousands of copyrighted photographs and video productions. FAC ¶ 14.

Plaintiff alleges that Defendants operate a number of infringing websites, some of which charge monthly memberships to access the content. FAC ¶¶ 4, 17-18. Defendants have allegedly copied, stored, displayed, and distributed thousands of Plaintiff’s copyrighted images and video clips without Plaintiff’s permission. FAC ¶¶ 5, 28-39.

Defendant Jennisights was served on October 1, 2010, and the other Defendants were served on October 19, 2010. Dkt. Nos. 7-8, 10, 12. None of the Defendants have filed an answer or otherwise responded. Dkt. No. 14. On December 6, 2010, the Clerk entered default against Defendants based on their failure to answer or otherwise respond to the Complaint. Dkt. No. 14.

DISCUSSION

I. Default Judgment

Plaintiff is entitled to default judgment against Defendants. Once default has been entered by the Clerk, it is within the district court’s discretion to grant default judgment against that party. FED. R. CIV. P. 55(b)(2); *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). When considering default judgment, “the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true.” *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987) (citations omitted); *see also* FED. R. CIV. P. 8(b)(6) (“[a]n allegation – other than one relating to the amount of damages – is admitted if a responsive pleading is required and the allegation is not denied”).

The Court may consider the following factors, articulated in *Eitel v. McCool*, when determining whether to grant default judgment: “(1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff’s substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default

1 was due to excusable neglect; and (7) the strong policy . . . favoring decisions on the merits.” 782
 2 F.2d at 1471-72.

3 All the *Eitel* factors weigh in favor of granting default judgment. “A plaintiff must meet two
 4 requirements to establish a prima facie case of copyright infringement: (1) ownership of the allegedly
 5 infringed material and (2) violation by the alleged infringer of at least one of the exclusive rights
 6 granted to copyright holders.” *LGS Architects, Inc. v. Concordia Homes of Nev.*, 434 F.3d 1150,
 7 1156 (9th Cir. 2006) (citing *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001)
 8 and 17 U.S.C. § 106). As outlined above, Plaintiff has alleged all the necessary elements for a cause
 9 of action for copyright infringement. Taking these allegations to be true, as the Court must, the FAC
 10 supports Plaintiff’s claim for copyright infringement. Further, because Plaintiff has sufficiently plead
 11 the claims asserted and provided the Court with evidence of Defendants’ display of Plaintiff’s
 12 copyrighted images, dispute as to material facts is unlikely. *Phillip Morris USA, Inc. v. Castworld*
 13 *Prods., Inc.*, 219 F.R.D. 494, 500 (C.D. Cal. 2003).

14 Additionally, Plaintiff will be prejudiced if default judgment is not entered because Plaintiff
 15 has no other means to recover for Defendants’ infringing conduct. There is nothing before the Court
 16 that suggests that the lack of response from Defendants was the result of excusable neglect. The sum
 17 of money at stake is not significant when the Court considers it in relation to Defendants’ conduct.
 18 *See Pepsico, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1176 (C.D. Cal. 2002). And finally, while
 19 there is a strong policy favoring disposition on the merits, that option is not available where, as here,
 20 defendants fail to appear. *Id.* at 1177. Because all of the *Eitel* factors weigh in favor of granting
 21 default judgment, the Court **GRANTS** Plaintiff’s motion for default judgment against Defendants.

22 **II. Damages**

23 Plaintiff is entitled to \$292,500 in statutory damages from Defendants. Plaintiff seeks
 24 \$780,000 in statutory damages under § 17 U.S.C. § 504. Section 504(c)(1) provides for statutory
 25 damages between \$750 and \$30,000 for each work infringed “as the court considers just.” Damages
 26 may be increased up to \$150,000 per work on a finding that the infringement was committed willfully
 27 and reduced to as little as \$200 per work on a finding that the infringer did not know and had no reason
 28 to know the conduct was infringing. 17 U.S.C. § 504(c)(2).

1 Plaintiff has identified 390 works that have been directly infringed by Defendants. Decl. of
 2 Dr. Norman Zada in Supp. of Perfect 10's Appl. for Default J. Plaintiff seeks \$2,000 per violation,
 3 for a total of \$780,000. Because Plaintiff has not established that Defendants' infringement was
 4 willful and Defendants have not appeared to assert a lack of knowledge, enhanced or reduced statutory
 5 damages are not warranted. But statutory damages are warranted for Defendants' significant infringing
 6 conduct. Accordingly, the Court awards Plaintiff \$750 per violation, for a total of \$292,500 in
 7 statutory damages.

8 **III. Injunction**

9 Plaintiff is entitled to a permanent injunction enjoining Defendants from infringing Plaintiff's
 10 copyrighted materials pursuant to 17 U.S.C. § 502(a) and California Business and Professions Code
 11 § 17203. Section 502(a) authorizes the Court to issue injunctions "on such terms as it may deem
 12 reasonable to prevent or restrain infringement of a copyright." Section 17203 authorizes injunctive
 13 relief against any unfair competition. Based on Plaintiff's evidence of ongoing infringement of its
 14 copyrights, the Court orders that Defendants, and each of them, and each of their respective
 15 subsidiaries, affiliates, successors, officers, directors, employees, agents, representatives, and any
 16 entities owned or controlled by them, shall be and are hereby permanently restrained and enjoined
 17 from:

18 (A) Violating Plaintiff's exclusive rights under the Copyright Act, including but not limited
 19 to copying, reproducing, distributing, displaying, adapting, offering or making available for
 20 sale or downloading, or otherwise infringing or contributing to the infringement of, any
 21 copyrighted picture, image or video owned by Plaintiff; and

22 (B) Displaying, allowing to be downloaded, and/or selling access to any (1) likenesses of
 23 celebrities or models or (2) copyrighted pictures, images, or videos from any website or by way
 24 of any other form of electronic distribution, unless Defendants have received prior express
 25 written permission from the models/licensees and the copyright holders.

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1 **IV. Costs and Attorney's Fees**


2 Finally, Plaintiff is entitled to costs and attorney's fees pursuant to 17 U.S.C. § 505. Section
3 505 authorizes recovery of the full costs of an action and reasonable attorney's fees to the prevailing
4 party. Accordingly, the Court finds Plaintiff is entitled to \$7,850 in attorney's fees and costs.

5 **CONCLUSION**

6 Plaintiff's motion for default judgment and a permanent injunction against Defendants is
7 **GRANTED**. Judgment is entered in favor of Plaintiff and against Defendants to be jointly and
8 severally liable in the amount of \$292,500 in statutory damages and \$7,850 in attorneys fees and
9 costs. Plaintiff's motion to file exhibits under seal is **GRANTED**. The February 14, 2011 hearing
10 date is vacated.

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12 **IT IS SO ORDERED.**

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14 DATED: February *07*, 2011



Hon. Roger T. Benitez
United States District Court Judge